

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 806.

WM. FRYE WHITE, RECEIVER OF COWARDIN, BRADLEY,
CLAY & CO., APPELLANT,

vs.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 22, 1911.

(24,484)

(24,484)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 309.

WM. FRYE WHITE, RECEIVER OF COWARDIN, BRADLEY,
CLAY & CO., APPELLANT,

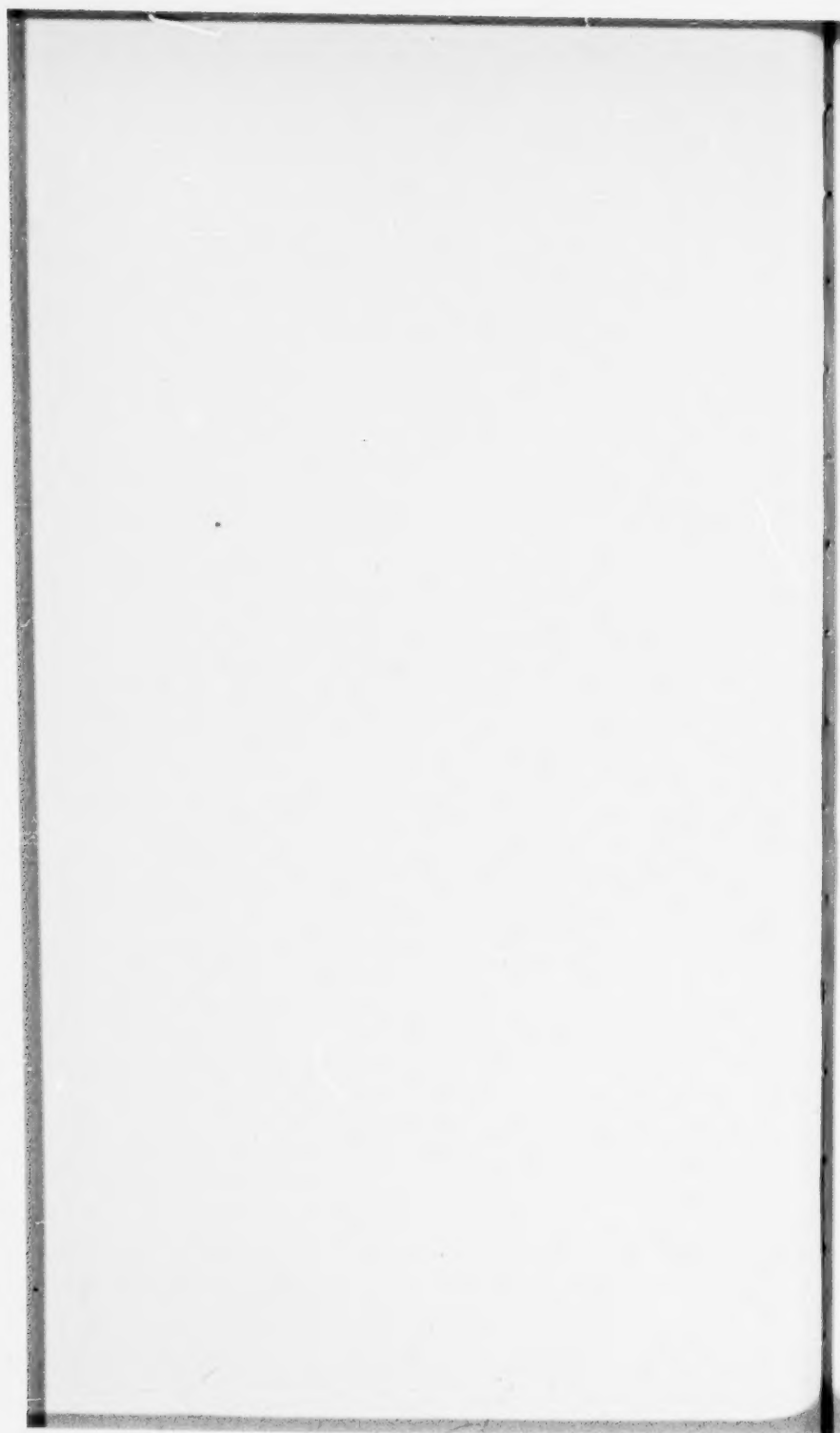
v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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Court of Claims.

No. 29618.

WM. FRYE WHITE, Receiver of Cowardin, Bradley, Clay & Co.,

vs.

THE UNITED STATES.

I. Petition and Amended Petition.

The original petition, filed July 25, 1906, was in the name of John D. Maclellan, receiver, Cowardin, Bradley, Clay & Company, and was filed by Cotton & White, as att'ys of record.

Subsequently, to wit: October 16, 1907, on the suggestion of death of claimant, Wm. Frye White, Receiver, was substituted as party claimant.

On October 16, 1907 the claimant filed his amended petition which is as follows:

Amended Petition.

Wm. Frye White of Washington in the District of Columbia, and Receiver of the firm of Cowardin, Bradley, Clay & Co., presents this, his petition in amendment of the petition heretofore filed in this Court by John D. Maclellan as Receiver of the said firm, and shows:

1. That he was appointed Receiver of the firm of Cowardin, Bradley, Clay & Co. by order of the Supreme Court of the District of Columbia on the 27th of June, 1907, in substitution of John D. Maclellan, deceased, with authority to prosecute in the Court of Claims the suit against the United States then pending on behalf of the said Maclellan, as Receiver of the said firm.

2. That he was duly qualified as Receiver aforesaid by the filing and approval of his bond in the said Supreme Court of the District of Columbia, on the 19th of July, 1907.

2 3. That petitioner is informed and believes and therefore alleges that on the 6th of April, 1903, the said firm of Cowardin, Bradley, Clay & Co. entered into a written contract with the United States to furnish labor and materials for the construction of a filtration plant in the said District of Columbia, in accordance with the said contract, specifications attached thereto and plans to be furnished by the United States and to be considered a part of said contract, which said contract and specifications were attached to the petition to which this is an amendment, and are now in the files of this court and which the petitioner asks may be read as a part hereof.

4. That petitioner is informed and believes and therefore alleges that the said firm began work upon said filtration plant under said contract and in accordance with said specifications and plans furnished by the United States, soon after the execution thereof, and so

continued until by order of the said Supreme Court of the District of Columbia, the said MacLennan was appointed receiver of the concerns of the said firm with authority to complete the construction of said filtration plant according to said contract, specifications and plans.

5. That petitioner is informed and believes and therefore alleges that thereafter the said MacLennan proceeded with the construction of said filtration plant and completed the same in accordance with said contract, specifications and plans furnished by the United States, with the exception of certain work hereinafter set forth, and the United States accepted the said filtration plant so constructed by the said firm and by the said MacLennan as Receiver and is now using the same.

6. That among other work which the said contractor agreed to perform was the construction of a certain roadway as provided for by said contract, specifications and plans furnished by the United States.

3 7. That petitioner is informed and believes and therefore alleges that among the work actually done by the said firm and the said Receiver in the construction of said filtration plant was the filling or embankment of 84,500 yards of earth in the said roadway, all of which work was done in conformity with the said contract, specifications and plans furnished by the United States and was accepted by the United States and is now in use by the United States.

8. That petitioner is informed and believes and therefore alleges that at various times during the construction of said fill or embankment of 84,500 yards the United States paid the said MacLennan on account of the said fill or embankment, as the same progressed, at the contract price of 30 cents per yard, less 10 per cent, various sums, which the claimant is unable to state because the evidence of said amounts of fill or embankment and the amounts paid therefor, with the exception of a payment in March, 1904, of \$3,501.00 for 13,000 yards at the contract price of 30 cents per yard, less 10 per cent, is in the possession of the United States, amounting in the aggregate to about \$12,000.00.

9. That petitioner is informed and believes and therefore alleges that at the time of the attempted final settlement between the United States and the said MacLennan the United States, as the claimant is informed and believes and so alleges, deducted from the total yardage of embankment to be paid for at the contract price, an amount equal to the yardage already paid for as alleged, by that means depriving the said MacLennan and this petition- of the said \$12,000.00 already paid on account of said fill or embankment, so that the said MacLennan or the claimant have never been paid anything on account of said roadway and the United States is justly owing the claimant the value of the said 84,500 yards of fill or embankment at the contract price of 30 cents a yard, to-wit: the sum of \$25,350.00.

4 10. That petitioner is informed and believes and therefore alleges that on or about the 14th day of February, 1905, there remained about 115,000 yards (the claimant can not state the

exact amount, because the data from which the exact amount can be obtained is in the possession of the United States) of fill or embankment to be made in order to complete the said roadway in accordance with the contract, specifications and plans furnished by the United States.

11. That petitioner is informed and believes and therefore alleges that on or about the said 14th of February, 1905, the United States notified the said Maclennan that no further work should be done on said roadway in accordance with the said contract, specifications and plans, and further notified the said Maclennan that no further payments would be made by the United States on account of work done or to be done on the said roadway.

12. That petitioner is informed and believes and therefore alleges that thereafter the said Maclennan ceased work upon the said roadway although he was ready and willing and offered to complete the said roadway in accordance with the said contract, specifications and plans furnished by the United States.

13. That petitioner is informed and believes and therefore alleges that by the refusal of the United States to allow the said Maclennan to complete the said roadway and receive the compensation provided by the contract therefor, your petitioner has been damaged to the extent of \$10,000.00 and the United States is justly owing him that sum.

14. That petitioner is informed and believes and therefore alleges that under the authority of the said contract Colonel Miller, of the Engineer Corps of the United States, in charge of the construction of said filtration plant, ordered the said Maclennan to construct a certain fill or embankment south of filter beds numbers 26 and 29, the said order being in writing, and the said Maclennan con-

5 structed the said fill or embankment in accordance with the instructions of the officers of the United States in charge of said work, and the amount of fill or embankment thus made was 27,200 yards.

15. That petitioner is informed and believes and therefore alleges that the United States has paid neither the said Maclennan nor the petitioner any money on account of the 27,200 yards of fill or embankment aforesaid, all of which said fill or embankment was accepted by the United States and is now in use by it, and the United States is justly owing the petitioner the sum of \$8,160.00 therefor.

16. That the United States, though often requested, has refused to pay any of the sums alleged to be due in paragraphs 9, 13, and 15 of the petition, and the petitioner is entitled to have judgment for the sum of \$43,510.00.

Wherefore, your petitioner prays that this Honorable Court will find that there is due your petitioner the sum of \$43,510.00, and allow judgment therefor.

WM. FRYE WHITE,

Receiver of Cowardin, Bradley, Clay & Co.

CITY OF WASHINGTON,
District of Columbia:

Wm. Frye White, being duly sworn, deposes and says that he has read the petition above and knows the contents thereof to be true of his own knowledge, except as to matters stated to be upon information and belief, and as to these matters he believes them to be true.

Subscribed and sworn to before me, Lewis F. Lindal, a notary public in and for the District of Columbia, this 14th day of October, 1907.

[SEAL.]

LEWIS F. LINDAL,
Notary Public, D. C.

6 II. *Stipulation of Counsel as to Contents of Record on Appeal and Parts of Contract as Agreed upon.*

It is this 16th day of December, 1914, stipulated and agreed between the parties by their respective counsel that in preparing the transcript of record for appeal in the above-entitled cause the clerk is requested to omit such parts of the written contract and of the written specification as were not included in the parts of the contract extracted for the use of the Court containing all parts referred to in argument by either side, hitherto filed herein on November 25, 1914.

Filed Dec. 17, 1914.

THE UNITED STATES,
 By HUSTON THOMPSON,
Its Attorney.
 THE CLAIMANT HEREIN,
 CHAUNCEY HACKETT,
His Attorney.

The parts of the contract and specification agreed to are as follows:

20. It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection; to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

24. Bidders are invited to be present at the opening of the bids.

These specifications are so drawn as to allow bidders to bid on any or all of the different classes. Bidders are invited to name separate prices for the following classes and for the items under each class as outlined in the proposal.

Class A. Excavation, embankment, puddle, seeding, and sodding.

Class B. Concrete masonry, granolithic pavement, placing materials in masonry, and drainage of roofs.

7 Class C. Furnishing and laying steep pipes and appurtenances.

Class D. Furnishing and laying cast and wrought-iron pipe and special castings.

Class E. Constructing exterior drainage system and manholes.

Class F. Main filter underdrains. Interior drainage system.

Class G. Furnishing and placing filter sand and filter gravel.

General Conditions.

25. A copy of the advertisement, and of the specifications, instructions, and conditions will be attached to the contract and form a part of it.

28. The contractor will not be allowed to take advantage of any error or omission in these specifications as full instructions will always be given should such error or omission be discovered.

29. The decision of the Engineer Officer in charge shall be final.

39. Once in every month the Engineer Officer in charge will make an estimate of the work done and materials delivered, and the value thereof, and will pay the contractor the amount due, less ten (10) per cent, which will be retained until the completion and final acceptance of the work done and materials delivered under these specifications. If at any time, in the judgment of the Engineer Officer in charge, the contractor is not making the progress required by these specifications, he may, in his discretion, suspend the monthly estimates and payments until such time as it appears that the contractor has reached and is maintaining the rate of progress necessary for the completion of the work within the time stipulated.

42. The contracts for this work are to be made under the following item contained in an "Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes:—

"For continuing work on a slow sand filtration plant, and for each and every purpose connected therewith, including the preparation of plans, and for the purchase of such scientific books and periodicals as may be approved by the Secretary of War, six hundred thousand dollars, to be available immediately and until expended: Provided, That all contracts authorized under appropriations for the slow sand-filtration plant shall provide for the completion of the work on or before December first, nineteen hundred and four: Provided further,

8 That the amount for which a contract or contracts may be entered into by the Secretary of War for such material and work as may be necessary for prosecuting the work on said slow-sand-filtration plant, and for each and every purpose connected therewith to final completion within the shortest practicable time, or within which the materials may be purchased and the work done otherwise than by contract, to be paid for as appropriations may from time to time be made by law, is hereby increased from two million seven hundred and sixty-eight thousand four hundred and five dollars to three million four hundred and sixty-eight thousand four hundred and five dollars."

In case the available funds become exhausted before the completion of contract the Engineer Officer in charge will give thirty (30)

days' written notice to the contractor that work may be suspended; but if the contractor so elects, he may continue work under the conditions of the specifications, after the time set by such notice, so long as funds for proper superintendence and inspection are available, with the understanding however, that no payments will be made for such work until additional funds have been provided in sufficient amount. When additional funds become available for continuing the work, the Engineer Officer in charge will give thirty (30) days' notice to the contractor that work must be resumed. Should payments be discontinued for a period of one year owing to lack of funds, the total amount reserved from previous payments shall be paid the contractor, it being understood that such payment will in no respect release the contractor from his obligations under the contract, but that the contract and accompanying bond are to remain in full force and virtue the same as if such reserved percentage had not been paid.

Amount available about \$2,030,000.

Work to be Done under These Specifications.

43. Work.—The work to be done under these specifications consists in making, furnishing, building, and placing the excavation and embankment and fill, the concrete masonry, the filter sand and gravel, granolithic pavement of the courts required for the construction of a system of filters and pure water reservoir, and the pipes and drains pertaining thereto. The cement for the concrete, and certain other materials shall be supplied by the United States.

44. These specifications do not include the sand washing apparatus, regulator houses and fixtures above the substructures the track system, pumping station and appurtenances, and other parts of the complete plant to be otherwise or subsequently supplied.

45. Plans.—The general extent, location and character of the work are shown by a set of 23 plans, numbered from 1 to 23 consecutively, which plans are made a part of these specifications, and which plans are on file at the office of the Washington Aqueduct.

46. Plant.—The complete plans as shown by the plans include 29 filters, with net areas of about one acre each. Of these filters, 1 to 24 inclusive shall be built first. The embankment under 9 filters shall be completed for filters 25 and 29 inclusive, in connection with the first part of the work, and other parts of filters 25 to 29 shall be done by the contractor at the unit prices provided in these specifications, if the same shall be ordered, in writing, by the Engineer Officer in charge, at least two months before the completion of the masonry in filters 1 to 24 inclusive, but the time of the completion of the work to be done under these specifications shall apply only to filters 1 to 24 inclusive, and in case the contractor is ordered to build the remaining filters under these specifications, an additional nine months shall be allowed for their completion after the time provided for the completion of the rest of the work.

50. Where fills or embankments are to be built, the top surface of the ground shall be excavated to such depth, determined by the En-

gineer Officer in charge, as shall be necessary to obtain a suitable foundation for the embankment or fill.

53. Disposal of Excavated Material.—All materials suitable for use for puddles, or the requisite amount thereof, shall be set aside and reserved for this purpose; and other select materials shall be reserved and used for embankments, filling, and for covering the filters. A part of the surplus material shall be deposited on the south slope of the dam and carried to such lines and slopes as the Engineer Officer in charge shall direct. All trees, bushes, and rubbish shall be cleared from the slope and adjacent ground at the foot of the dam before the material is deposited. The contractor must make all arrangements for the disposal of surplus material, and hold the United States harmless against all claims whatever relating thereto.

A. Embankment. Items Nos. 2, 3, and 4.

57. The work under this heading includes the filling of low places under filters and other structures, the filling of central courts, the embankment about the filters, and all other fills and embankments shown by the plans or directed to be made by the Engineer Officer in charge.

58. Classification.—Embankments shall be divided into three classes:

1. Embankment under filters,

2. Embankments about the walls of filters and in courts,

3. Filling over filters.

Material placed below the dam, in the roadways and at other low places for the purpose of disposing of it, and material disposed of off the ground shall not be paid for as embankment. When waste embankments come against the walls of the filters, or the pure water reservoir the usual section shall be built and paid for as embankment and all materials outside shall be treated as waste.

59. Embankment under Filters.—Item 2. The ground shall be carefully cleared and soft material excavated before the commencement of the fill. The contractor shall also remove so much of the loose fill previously made as the Engineer Officer in charge shall deem as not sufficiently compact to carry the load to be placed upon it without settlement and shall order removed. Material removed shall be paid for as excavation.

60. In addition to the preparation of the surface of the ground to be covered by filling or embankment, as described under "Excavation," it shall, after the removal of loam and top soil, be furrowed or picked up to make a bond with the filling or embankment, and on sloping ground shall be steeped as directed by the Engineer Office in charge.

61. The fill shall be composed of the most suitable materials found in excavation, preferably clay and gravel mixed, placed in three-inch layers and rolled with a grooved roller weighing at least ten tons and passing over each part of each layer at least six times and as many more times as may be necessary to thoroughly compact and

solidify the material. The filling material shall not be placed or rolled when too wet to allow proper solidification and rolling, and if too dry it shall be moistened by sprinkling with water, which sprinkling shall be done with water supplied by the contractor in such manner and quantity as the Engineer Officer in charge shall direct.

62. Embankment under filters shall be carried to a height of about six inches above the proposed foundation of the filters, or to such other heights as the Engineer Officer in charge shall order, and shall be allowed to stand as long as possible before the construction of the filters, and just prior to the construction of filters it shall be graded precisely to the required level. The material found by measurement above the foundation level at this time shall be paid for as both embankment and as excavation.

63. Embankments About Walls of Filters and in Courts.—Item 3. These embankments shall be made as embankments under filters, except that materials may be taken as they come in excavation without selection, except that soil or any manifestly unsuitable material shall be excluded, and may be placed in six inch layers instead of three inch layers, and the finished surface shall be left as nearly as possible at the desired grade, which in the embankment about the filters shall be approximately level within the springing line, and under courts shall be the required grade for the foundation of the pavement. Exposed faces shall be covered with soil and smoothed to the required surfaces.

Work. A. Sodding. Item 7.

76. Work.—The contractor shall furnish and place good grass sod on top of the loam or top soil at the edges of the embankments and at other places shown on the plans or designated by the Engineer Officer in charge.

77. Materials.—The sod shall be of good quality of earth, covered with heavy grass, sound, healthy, at least one (1) foot square and two (2) inches thick, and free from weeds. They shall be cut with a bevel on the sides, so that they will lap at the edges.

78. Placing.—The surface of the top soil shall be dampened immediately previous to laying the sod. The sods shall be properly and carefully set so as to have a full bearing on their whole lower surfaces. They shall be padded down firmly with a spade or wooden bat, and pinned if necessary.

79. Grades and Maintenance.—All details as to lines, grades, care and maintenance of sodded surfaces shall be specified under "Seeding."

80. Compensation and Measurement.—Compensation per square yard for sodding shall include all labor, tools, and materials necessary for furnishing and placing sod, and maintaining all sodded areas. Measurement of sodded areas shall be according to lines given by the Engineer Officer in charge.

THE UNITED STATES.

General Clauses.

285. Plans and Specifications.—The plans and specifications are intended to be explanatory of each other, but should any discrepancy appear, or any misunderstanding arise, as to the import of anything contained in either, the explanation of the Engineer Officer in charge shall be final and binding on the contractor; and all directions, explanations, and detailed or corrected plans, required or necessary to complete any of the provisions of these plans and specifications and give them due effect, will be given by the Engineer Officer in charge.

286. Lines and Grades.—All lines and grades will be given by the Engineer Officer in charge. The contractor shall furnish such assistance and materials as may be needed to establish such marks, which must be carefully preserved.

287. Inspection.—The Engineer Officer in charge and his assistants shall have access at all times to all parts of any work being done, for purposes of inspection, measurement, and establishing lines and grades. Any inferior work allowed by inspectors, or done during their absence, shall not relieve the contractor from repairing the work and removing faulty material at his own cost. The contractor shall personally supervise the work, and when not personally present, shall be represented by a competent foreman or agent who shall have full authority to act as the contractor's legal representative.

291. Extra Work.—The contractor shall do any work not herein otherwise provided for which may be necessary for the proper completion of the work, if required, but no such work shall be allowed or paid for except upon a written order signed by the Engineer Officer in charge, at prices approved by him, and there shall be no claim for extra work or materials or for damage sustained except under this article.

292. In case no price is agreed upon, or if the Engineer Officer in charge shall so order, the actual cost of the work and materials shall be determined by the Engineer Officer in charge, and the contractor shall receive as full compensation for such work and materials, the actual cost with 15 per cent added.

293. Work Done by the United States.—The United States will construct the gatehouses, sand washers, pumping station, mecadam roadways and other structures not included in these specifications and necessary for the completeness of the plant, and the work to be done under these specifications shall be carried on so as to facilitate and not discommode the prosecution of that and other adjoining and contiguous work, whether done by the United States or by another contractor.

294. Roadways.—The United States shall cause to be maintained by the contractor reasonable passageways and roadways, leaving the necessary clear space, and the work under each class shall at all times be so carried on as not to interfere with any other work done in connection with this plant.

Proposals for Filter Materials and Work.

— — —, 1903.

Lieut. Colonel A. M. Miller, Corps of Engineers, U. S. Army, Washington, D. C.

COLONEL: In accordance with your advertisement of March 19, 1903, inviting proposals for work and materials for filtration plant, and subject to all the conditions and requirements thereof, and of your specifications of same date, copies of both of which are hereto attached and, so far as they relate to this proposal, are made a part of it, we or I propose to perform the work or furnish the materials required as follows, all quantities specified being "more or less."

Excavation.	Per unit.		Total.	
	Dollars.	Cents.	Dollars.	Cents.
A. 880,000 cubic yards at — (—) cents per cubic yard.....
Embankment under filters:				
A. 65,400 cubic yards at — (—) dollars and — (—) cents per cubic yard.....
Other embankment:				
A. 46,700 cubic yards at — (—) dollars and — (—) cents per cubic yard.
Filling over filters:				
A. 123,400 cubic yards at — (—) dollars and — (—) cents per cubic yard.....
Puddle:				
A. 2,000 cubic yards at — (—) dollars and — (—) cents per cubic yard.
Seeding:				
A. 31 acres at — (—) dollars and — (—) per acre.....
Sodding:				
A. 9,700 square yards at — (—) dollars and — (—) cents per square yard.....

Form 19a.

1. This Agreement entered into this sixth day of April, nineteen hundred and three, between Lieut. Colonel A. M. Miller, Corps of Engineers, United States Army, of the first part, and S. P. Cowardin, James F. Bradley, S. P. Clay, Thos. E. Stagg, and M. Kelly, part-

ners composing the firm of Cowardin, Bradley, Clay & Company, of Richmond in the county of Henrico, State of Virginia, of the second part, Witnesseth, that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Lieut. Colonel A. M. Miller, Corps of Engineers, U. S. Army, for and in behalf of the United States of America, and the said Cowardin, Bradley, Clay & Company, do covenant and agree, to and with each other, as follows:

The said party of the second part agrees to furnish all the materials (except the cement) and do all the work necessary under Class A and Class B of the attached plans and specifications, in full accordance with the terms of said plans and specifications;

And the said party of the first part agrees to pay to the said party of the second part, as specified, the following sums for materials furnished and work done, all quantities being more or less:—Class A—for eight hundred and eighty thousand (880,000) cubic yards excavation, for sixty-five thousand four hundred (65,400) cubic yards embankment under filters, for forty-six thousand seven hundred (46,700) cubic yards other embankment, and for one hundred and twenty-three thousand four hundred (123,400) cubic yards filling over filters, all at thirty (30) cents per cubic yard; for two thousand (2,000) cubic yards puddle at one dollar (\$1.00) per cubic yard; for thirty-one (31) acres seeding at seventy-five dollars (\$75.00) per acre; for nine thousand seven hundred (9,700) square yards sodding at twenty-five (25) cents per square yard. Class B—for thirty-nine thousand three hundred (39,300) cubic yards concrete in floors at four dollars and fifty cents (\$4.50) per cubic yard; for twenty-six thousand three hundred (26,300) cubic yards concrete in walls at five dollars and ten cents (\$5.10) per cubic yard; for eight thousand two hundred (8,200) cubic yards concrete in piers at six dollars (\$6.00) per cubic yard; for thirty-seven thousand four hundred (37,400) cubic yards concrete in vaulting at six dollars and fifty cents (\$6.50) per cubic yard; for thirty-five thousand (35,000) square yards granolithic pavement at ninety (90) cents per square yard; for placing materials in masonry, complete, at two hundred dollars (\$200.00) per filter, and for drainage of roofs at two hundred and sixty-six dollars (\$266.00) per filter, when the said materials shall have been furnished and the work done in full accordance with the attached plans and specifications.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 47-140 of the attached specifications.

* * * * *

6. If, at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in

the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

* * * * *

11. Payments shall be made to the said party of the second part as prescribed in paragraphs 39 & 42 of the specifications hereto attached and forming part of this agreement.

* * * * *

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III. *Traverse. Filed Oct. 16, 1907.*

In the Court of Claims of the United States, December Term,
A. D. —.

No. 29618.

WM. FRYE WHITE, Receiver,

vs.

THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.
A. B.

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IV. *History of Proceedings.*

On December 22, 1909, at the request of the attorney of record, Mr. Chauncey Hackett was entered as of counsel.

On June 3, 1912, the case was submitted by Mr. Chauncey

Hackett, for the claimant, and by Mr. F. De C. Faust, for the defendants.

On November 21, 1912, the Court filed an order remanding the case to the trial calendar for oral argument.

V. *Argument and Submission of Case.*

On November 21, 1912, the case came on to be heard. Mr. Chauncey Hackett was heard for the claimant; Mr. Louis G. Bissell was heard in opposition and the case was submitted.

18 VI. *Findings of Fact, Conclusion of Law, and Opinion of the Court.*

Filed February 10, 1913.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

William Frye White, the claimant herein, is a citizen of the United States and a resident at the time of the filing of the amended petition herein of the District of Columbia, and is now a resident of Boston, Mass. He is the duly qualified receiver of the firm of Cowardin, Bradley, Clay & Co. by appointment of the Supreme Court of the District of Columbia, made June 27, 1907, in substitution for the original claimant, John D. McClennan, deceased, who had been appointed receiver of said firm in August, 1903.

By order of said supreme court claimant was empowered to prosecute this suit, then pending and entered as John D. McClennan, Receiver, etc., v. The United States, and subsequently, by leave of this court, White filed herein an amended petition as receiver of the said firm of Cowardin, Bradley, Clay & Co.

II.

On the 6th day of April, 1903, said firm entered into a written contract with Lieut. Col. A. M. Miller, acting on behalf of the United States, to furnish labor and material for the construction of a filtration plant in the city of Washington, D. C., in accordance with the plans and specifications attached thereto and made a part thereof. A copy of said contract and the advertisement and specifications, instructions, and conditions thereto belonging and forming a part thereof are attached to the amended petition herein and made a part of the same.

The site of the filtration plant which the contractor constructed and of the reservoir adjacent thereto is in the city of Washington, beginning on the west side of North Capitol Street, immediately south of the south entrance to the Soldiers' Home grounds, and extends thence south and west for some distance, the works being bounded by the following streets: North Capitol Street, Channing Street to First Street west, Bryant Street, the blocks abutting on Fourth Street west, Hobart Street, the Soldiers' Home grounds, and Michigan Avenue.

There is a driveway running at a varying grade completely about the reservoir, which is an irregularly shaped body of water, comprising the western and southern part of the filtration plant. That part of the driveway about the Washington City reservoir for building which this claim is brought (and called throughout this record "the roadway") starts from the north side of the Washington City reservoir at a hill on which is situated the superintendent's house and runs easterly and then south along the west side of the Soldiers' Home property line to W. A. E. stone 69, then west of filter 6, Court No. 2, filter 2, filter 1, to the pumping station around the south side of the pumping station as well as by the north side of the pumping station, around the end of the outlet gatehouse; and southwest again along the east side of the reservoir to a point where it reaches the approximate grade of the south dam of the Washington City reservoir.

IV.

The set of plans attached to the written contract and by its terms made a part of the agreement between the parties included certain plans showing the roadway bordering the reservoir west of the filter beds. One of these plans was a plan known as sheet No. 2, which was a drawing showing the work in general sections and indicating said roadway thereon. Another plan among those attached to the contract was known as sheet No. 4, which was a general plan showing finished surfaces on which was indicated the roadway. Another plan was sheet No. 16, indicating the roadway. Another plan was one general plan of the works, known as general plan No. 1, showing the entire projected filtration plant and indicating said roadway thereon. The four plans hereinbefore mentioned and marked "Claimant's Exhibits Nos. 2, 3, 4, and 5," respectively, are made a part of this finding.

V.

Afterwards two supplemental plans relating to the roadway and giving details as to grades were furnished contractor. One of said plans was marked "No. 1," in lead pencil, and dated June 14, 1904, and the other was marked "No. 2," in lead pencil, dated June 14, 1904, corrected November 2, 1904. Said plans marked "Claimant's Exhibits 6 and 7," respectively, are made a part of this finding.

VI.

In January or February, 1904, claimant's predecessor, McClennan, began work on said roadway. The initial work was confined to the part of the road north of Michigan Avenue extended, and this part was substantially completed before the work was begun generally on the southern section of the road. The portion of the road north of Michigan Avenue extended was afterwards sodded by the contractor and he was paid for said sodding by the Government at the contract price.

It does not appear that the contractor was ordered in terms by the Government engineers to build this roadway. The evidence shows that when he commenced work on it the engineers gave him the line of the toe of the slope and that said engineers from time to time furnished him with the lines showing the direction of the road and the stakes showing the grade, and that the work was done under their inspection as to the lines, slopes, and the character of the material allowed to be deposited thereon.

The contractor began to build said road by filling in with earth excavated from other parts of the work, and he continued to fill in and build said roadway in accordance with the plans and under the inspection of the Government engineers until February 14, 1905. Up to that time he had been paid at various times about \$12,000 on account of work done on said roadway on estimates made by the Government engineers. The first of said payments was on voucher, month of March, 1904, covering all work done by the contractor on the road up to the end of February, 1904, for "embankment (A, item No. 2), 13,000 cubic yards, at 30 cents, less 10 per cent retained, amounting to \$3,510." Except for said voucher, no separate estimates were made of the amount of fill placed in the roadway, the work done thereon being included in the regular monthly estimates with the work done on other portions of the filtration plant.

Shortly after McClennan was appointed receiver, in August, 1903, he made arrangements with the Soldiers' Home authorities, at a considerable cost, to dispose of waste material on the Soldiers' Home grounds under certain conditions, the terms of which, so far as the amount of material to be placed thereon, were never fully carried out. The roadway in question was just as convenient a place as any to dispose of waste material and the cost to the contractor of placing the material excavated on the roadway was no more than it would have been to place it in the Soldiers' Home grounds.

VII.

On February 14, 1905, the contractor, through McClennan, receiver at that time, was informed by the engineer officer in charge on behalf of the United States that he would refuse to allow further payments for work on the roadway. For a short time thereafter, pending negotiations regarding the matter with the engineer officer, claimant continued dumping material that he wanted to dispose of on the roadway. He finally discontinued work thereon, at which

time about 6,000 cubic yards of fill was necessary to complete the roadway. Said roadway was subsequently finished by the United States without further cost.

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VIII.

In final settlement there was deducted from the balance due claimant a sum equal to such of the fill in the roadway as had been paid for at the rate of 30 cents per cubic yard, amounting to about \$12,000.

IX.

On or about February 15, 1904, the Government engineer in charge had cross sections taken over the line of the roadway in question, which cross sections were used in computing the amount of work done by the contractor thereon outside of the lines allowed and paid for in the final estimate, and the amount of fill so made and not paid for was found to be 67,578 cubic yards, which at 30 cents per cubic yard amounts to \$20,273.40.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant herein is not entitled to recover and the petition is dismissed.

Opinion.

BARNEY, J., delivered the opinion of the court:

This suit arises out of a contract for the performance of certain work in connection with construction of a filtration plant situated in the District of Columbia. The contract was made between the Government and the firm of Cowardin, Bradley, Clay & Co., but shortly after the beginning of the work John D. McClennan was appointed receiver of said firm of contractors, and, as such receiver, completed it. This suit was begun by McClennan, who is now deceased. After his decease the present claimant was appointed receiver in his stead for the purpose of completing its prosecution. For the purpose of avoiding confusion, both the original contracting firm and Mr. McClennan will be referred to as "the contractors."

The claim in this case is but for one item only, and that is pay for earth deposited upon a certain roadway, it being contended by the plaintiff that the contractors should be paid for earth thus deposited as "other fills and embankments shown by the plans or directed to be made by the engineer officer in charge," mentioned in the contract, and for which pay at a certain rate per cubic yard is provided in the contract. On the other hand, it is contended by the defendants that under the terms of the contract the earth thus deposited is not the "fills and embankments" therein provided for, but is mere "waste" arising from the excavation work, for payment of which the contract contains no provision.

The first paragraph of the contract provides in general terms for the work to be done under it and the prices therefor to be paid, and makes the following provisions as to payment for fills and embankments, viz: "for sixty-five thousand four hundred (65,400) cubic yards embankment under filters, for forty-six thousand seven hundred (46,700) cubic yards other embankment, and for one hundred and twenty-three thousand four hundred (123,400) cubic yards filling over filters;" and this is the only mention or provision in the contract (aside from the specification thereto attached) as to fills and embankments. It will thus be seen that the contract stand-

22 ing alone provides for two kinds of embankment and one kind of filling. The provision for filling is specific in character, and under the well-recognized rule *unius expressio est alterius exclusio* excludes every other kind of filling unless otherwise clearly shown by the specifications. We say clearly shown because of the well-known rule that when there is a conflict between the contract and the specifications the contract must govern. If, however, the deduction from the contract is only by inference and the specifications upon that point are clear and beyond question, a different rule might prevail. Particular attention is called to this feature of the contract for the reason that the plaintiff seeks to recover in this suit for the earth deposited upon the roadway in question as a "fill," and it doubtless comes within the definition of that term, though, as we understand, it is contended that, taking the contract and specifications together, it comes within both terms.

One of the kinds of embankment provided for is also specific in character, and under the rule above mentioned this also excludes all other kinds of embankment unless unmistakably provided for in the specifications; but as the plaintiff makes no claim under this item, it need not be further considered. The other item of "other embankment" will be considered further on in this opinion.

The plaintiff's claim, however, rests upon certain provisions of the specifications, and more particularly upon paragraphs 57 and 58, which are as follows:

"57. Work.—The work under this heading includes the filling of low places under filters and other structures, the filling of central courts, the embankments about the filters, and all other fills and embankments shown by the plans or directed to be made by the engineer officer in charge.

"58. Classification.—Embankments shall be divided into three classes:

"1. Embankment under filters.

"2. Embankments about the walls of filters and in courts.

"3. Filling over filters.

"Material placed below the dam, in the roadway and at other low places for the purpose of disposing of it, and material disposed of off the ground shall not be paid for as embankment. When waste embankments come against the walls of the filters or the pure-water reservoir the usual section shall be built and paid for as embankment, and all material outside shall be treated as waste."

It is contended by the plaintiff that the phrase "and all other fills

and embankments shown by the plans" in the above paragraph applies to the filling up of the roadway in question, because the same was shown upon the plans submitted with the proposals. An examination of the plans submitted with the proposals for the work shows that the roadway was indicated thereon, but contained no detail whatsoever as to exact location or dimensions. They merely mark where a roadway is to be placed. The findings show that when the contractors first began to deposit material upon the roadway the engineer officer in charge gave them the toe lines and slope of the same, and some months after the work was begun and after the contractor had placed considerable material upon this roadway the engineer officer

23 in charge of the work furnished the contractor with a plan showing in detail the location and dimensions of this roadway, and thereafter the contractors deposited earth thereon under the inspection of this engineer officer as to the character of the earth thus placed, its dimensions, etc. This was continued and payments for the same made in the first voucher as "other fills and embankment," and thereafter without any separate designation, to the extent of \$12,000, when it was concluded by the engineer officer in charge of the work that this filling of the roadway was not to be paid for under the contract, and payment for the same was then stopped and the \$12,000 already paid deducted for subsequent sums earned under the contract. It should also here be stated that the findings do not show that the engineer officer in charge of the work ever directed in terms any deposit of waste material to be made upon the roadway.

It will be seen that paragraph 58 above quoted specifically provides for three classes of embankments: (1) Embankment under filters; (2) embankments about the walls of filters and in courts; (3) filling over filters; thus putting "fills" and "embankments" in the same class. No mention is made here of any filling to be placed upon roadways. This is a very significant fact militating against the contention of the plaintiff, because he now claims that the filling required for the roadway was nearly as much in amount as that estimated in the contract for "filling over filters," which was specifically mentioned above.

It should also be noted that the classification of embankments made in paragraph 58 of the specifications is in perfect harmony with the first paragraph of the contract before quoted, for there we find practically the same classification with estimated amounts contained in the same, viz: "65,400 cubic yards embankment under filters, 46,700 cubic yards other embankment, and 123,400 cubic yards filling over filters." By thus comparing the first paragraph of the contract and paragraphs 57 and 58 of the specifications, we are forced to the conclusion that the "other embankment" provided for in the contract is the "embankments about the walls of filters and in courts" provided for in the specifications. We also here call attention to the fact that the estimated amount of "other embankment" provided for in the contract is 46,700 cubic yards, while the amount claimed for filling the roadway alone is more than double that amount. If the whole contract, including the specifications, had contemplated

paying for the filling deposited in the roadway, it is hardly possible that there should have been such a discrepancy in the estimates.

Again, paragraph 58 provides that "material placed below the dam, in the roadways, and at other low places for the purpose of disposing of it, and material disposed of off the ground shall not be paid for an embankment." Here again filling is confounded with embankment, and while it is argued that the roadway in question was not a "low place," is it not unbelievable that the contract contemplated paying for the filling of this roadway which was not mentioned in either contract or specifications and which involved so large a part of the work, while it did specifically provide that no payment should be made for material placed "in the roadways and other low places"? And, for that matter, it certainly was a "low place" in the sense in which that term was used, otherwise 100,000 cubic yards of material would not have been required to fill it. Tak-

ing the contract as a whole it is inconceivable that a work
24 of such a distinctive character and magnitude as the filling of this roadway could have been intended to have been included in the phrase "all other fills and embankments shown by the plans or directed to be made by the engineer officer in charge."

As before stated, the findings show that during the time material was being placed upon the roadway the Government officers inspected the work as to lines, slopes, etc., and the plaintiff argues that this fact goes very far to show that it was filling provided to be paid for in the contract. There would be much force to this argument were it not for other circumstances connected with this work which explain this conduct of the Government officers. Paragraph 293 of the specifications shows that the Government contemplated the construction by itself of roadways in connection with this filtering plant, and is as follows:

"293. Work done by United States.—The United States will construct the gatehouses, sand washers, pumping station, macadam roadways, and other structures not included in these specifications and necessary for the completeness of the plant, and the work to be done under these specifications shall be carried on so as to facilitate and not to discommode the prosecution of that and other adjoining and contiguous work, whether done by the United States or by another contractor."

The findings show that this roadway was as convenient a place as any for the disposal of material taken from the filter beds, and they also show that the contractor was in some instances compelled to pay for the privilege of depositing waste outside of the filter-plant reservation. It thus appears to have been a privilege rather than otherwise for the contractors to have been allowed the right to deposit material excavated from the filter beds upon this roadway. While he was doing this, of course it was the duty of the Government officers in charge to oversee and direct the work to the end that it should not interfere with the Government project for the whole plant, including the roadway.

The plaintiff contends that the allowance for a time by the engineer in charge for the fill on the roadway as coming within the pro-

vision for fill or embankment for which the contractors were to be paid, was a practical construction of the contract which must now prevail. The answer to this contention is that such construction was afterwards and during the progress of the work reversed; also that the rule invoked prevails only where the contract is susceptible of more than one interpretation. (*Gibbons v. United States*, 109, U. S., 200; *District of Columbia v. Gallagher*, 124 U. S., 505.)

It is also contended that even if the work of filling the roadway was not within the contract, as it was of advantage to the Government, the plaintiff should recover upon quantum meruit. But, as the findings show, it involved no extra expense to the contractors, hence does not come within that rule; and, if our view of the contract is right, it was work performed outside of the contract for which the plaintiff is not entitled to recover upon quantum meruit, under the decision in *Plumley v. United States*, handed down January 6, 1913, by the Supreme Court.

It is ordered that a judgment be entered in this case dismissing the petition.

VII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 10th day of February, 1913, judgment was ordered to be entered as follows:

The Court on due consideration of the premises, find for the defendants, and do order, adjudge and decree, that the petition of the claimant, Wm. Frye White, Receiver of Cowardin, Bradley, Clay & Co., be, and the same is hereby dismissed.

By the COURT.

VIII. *History of Proceedings After Judgment Rendered.*

On April 30, 1913, the claimant filed a motion for rehearing, and also a motion for a new trial.

On November 9, 1914, the court overruled both of said motions.

On November 10, 1914, the claimant filed a motion to set aside orders overruling motions for re-hearing and new trial.

On November 16, 1914, the Court allowed the claimant's motion of November 10, 1914, and set said motion for hearing on November 23, 1914.

On November 23, 1914, claimant's motion for a new trial was argued by Mr. Chauncey Hackett for the motion, and by Mr. Richard P. Whiteley in opposition, and the motion was submitted.

On November 30, 1914, claimant's motion for a new trial was overruled.

On December 12, 1914, Chauncey Hackett, Esq., was substituted as attorney of record.

26 IX. *Application for, and Allowance of, Appeal.*

From the judgment rendered in the above-entitled cause on the 10th day of February, 1913, made final by the order of Court herein, dated November 30th, 1914, in favor of defendant, the claimant by his attorney of record on the 14th day of December, 1914, makes application for and gives notice of an appeal to the Supreme Court of the United States.

CHAUNCEY HACKETT,
Attorney of Record.

Filed December 14, 1914.

Ordered: That the above appeal be allowed as prayed for.
By the COURT.

December 14, 1914.

27 Court of Claims.

No. 29618.

WM. FRYE WHITE, Receiver of Cowardin, Bradley, Clay & Co.,
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the Court; of the judgment of the Court; of a history of proceedings after judgment rendered; of the claimant's application for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City, this 23rd day of December, A. D. 1914.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 24,484. Court of Claims. Term No. 309. Wm. Frye White, receiver of Cowardin, Bradley, Clay & Co., appellant, vs. The United States. Filed December 23d, 1914. File No. 24,484.